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New 2019 Labor Laws Affecting California Employers

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With the upcoming new year comes a host of new California employment laws that will take effect on January 1 and beyond.

Many of the new laws stemmed from the #MeToo movement and strengthen harassment protections, while others clear up ambiguities in laws that were passed last year, such as the ban on asking about an applicant's salary history. And a few make small changes or may only affect employers in specific industries.

Unless specified, all new legislation goes into effect on January 1, 2019.

Leaves of Absence and Benefits

New laws were signed related to California's Paid Family Leave (PFL) program and lactation accommodation.

Paid Family Leave

SB 1123 will allow employees to collect PFL benefits beginning January 1, 2021, if they take time off for activities related to the covered active duty status of their spouse, registered domestic partner, child or parent who is a member of the US Armed Forces. Called "qualifying exigencies," these activities include such things as official military ceremonies; briefings; changes to child care/financial/legal arrangements as a result of military service; counseling; or spending time with the covered service member during rest and recuperation leave, among others. While PFL itself does not provide a leave, the federal Family and Medical Leave Act (FMLA) provides up to 12 weeks of protected leave for qualifying exigencies.

Beginning January 1, 2021, employees may collect PFL benefits when taking time off for "qualifying exigencies."

Lactation Accommodation

California employers currently must provide a private location in close proximity to the employee's work area, other than a toilet stall, for an employee to express breast milk. AB 1976 brings California law into conformity with federal law by requiring that the employer provide a location other than a "bathroom," rather than a toilet stall. The new law will provide an undue hardship exemption under limited circumstances.

Hiring Practices

New laws provide clarity about last year's salary history ban and tighten up rules on considering convictions in hiring decisions.

Salary History

Last year's law banning inquiries about salary history and requiring employers to provide pay scales to applicants upon request contained some ambiguities that were addressed in this year's AB 2282. The Labor Code will be amended to clarify that:

- Employers can ask about an applicant's salary expectations for the position being applied for;
- Only external applicants (not current employees) are entitled to a pay scale upon request, and only after completing an initial interview; and
- The pay scale provided only needs to include salary or hourly wage ranges.

In addition, compensation decisions based on a current employee's existing salary, such as for giving raises or bonuses, will be permissible if justified by factors such as a seniority or merit system.

Criminal Background Checks

Current law generally prohibits consideration of an applicant's judicially sealed or expunged convictions. SB 1412 will narrow an employer's ability to consider sealed or expunged convictions to only those circumstances where a particular conviction would legally prohibit someone from holding that job.

Employers and sexual harassment victims are now better protected from liability for defamation by an alleged harasser.

Discrimination, Harassment and Retaliation Protections

Several new laws focus on increasing harassment and discrimination protections for 2019.

Harassment — Defamation Protection

Employers and sexual harassment victims will now be better protected from liability for defamation by an alleged harasser after a complaint of sexual harassment has been made. AB 2770 establishes that under California law:

- Employees who report sexual harassment, based on credible evidence and without malice, won't be liable for injury to the alleged harasser's reputation;
- Communications between the employer and victims/witnesses will be protected; and
- An employer will now be permitted to reveal in a job reference whether an individual is not eligible for rehire because the employer determined that he/she engaged in sexual harassment.

Confidentiality Clauses in Settlement Agreements

SB 820 will prohibit any settlement agreement in a case where sexual harassment, assault or discrimination has been alleged from including a confidentiality provision that prohibits disclosure of factual information regarding the claim, except with regard to the claimant's identity.

Sexual Harassment

SB 1300 will make numerous changes to California's Fair Employment and Housing Act (FEHA) relating to workplace harassment claims. It will prohibit an employer from requiring an employee, in exchange for a raise or bonus, or as a condition of employment or continued employment to:

- Agree not to sue or bring a claim against the employer under FEHA; or
- Sign a non-disparagement agreement preventing the employee from disclosing information about unlawful acts in the workplace, including but not limited to sexual harassment.

These prohibitions won't apply to negotiated settlement agreements or severance agreements. SB 1300 also will expand employer liability for unlawful harassment by nonemployees and prohibit a prevailing defendant from being awarded attorney's fees and costs unless specific factors are proven.

By January 1, 2020, employers with five or more employees must provide sexual harassment training to both supervisors and nonsupervisorial employees.

Sexual Harassment Training

Current law requires employers with 50 or more employees to provide supervisors with two hours of sexual harassment training. Under SB 1343, by January 1, 2020, all employers with five or more employees will be required to provide two hours of sexual harassment training to supervisors and one hour to nonsupervisorial employees within six months of hire or promotion, and every two years after that.

Temporary and seasonal employees will be required to be trained within 30 days of hire or 100 hours worked, whichever is earlier.

Waivers of Right to Testify

Under AB 3109, any provision in a contract or settlement agreement will be deemed unenforceable if it prohibits testimony about criminal conduct or sexual harassment in an administrative, legislative or judicial proceeding. AB 3109 covers only testimony that is required, such as by subpoena or court order, or in response to a written request in an administrative or legislative hearing.

Gender Representation on Boards of Directors

Any publicly held corporation with principal executive offices in California will be required to place at least one female director on its board by December 31, 2019. Depending on the board's size, up to three female members may be required by the end of 2021. Significant financial penalties apply if a company fails to achieve the required number of female directors.

Sexual Harassment Educational Materials — Talent Agencies

Under AB 2338, talent agencies will need to provide their adult artists with educational materials on sexual harassment prevention, retaliation and reporting resources, as well as on nutrition and eating disorders. All materials must be provided within 90 days in a language the artist understands. Artists who are between the

ages of 14 and 17, along with their parent or legal guardian, will need to receive and complete training in sexual harassment prevention, retaliation and reporting resources before they are issued a work permit.

The new law imposes penalties and recordkeeping requirements. Talent agencies will be required to confirm to the Labor Commissioner, as a part of their license renewal process, that they are providing the relevant educational materials.

Sexual Harassment — Professional Relationship

Current California law imposes liability for sexual harassment that occurs in the course of a business, service or professional relationship. Examples include doctors, attorneys, bankers and accountants, among others. SB 224 extends the list to elected officials, lobbyists, investors, directors and producers, and anyone who holds himself/herself out as being able to help someone establish a business, service or professional relationship.

California's minimum wage increases to $11/hour for employers of 25 or fewer employees and $12/hour for employers of 26 or more.

Wage and Hour

On January 1, 2019, the state minimum wage increases to $11 per hour for employers with 25 or fewer employees and to $12 per hour for employers with 26 or more employees. This is not a new law — SB 3 was signed in 2016, and this is the next mandatory increase. To learn more, CalChamber members can download the 2019 Minimum Wage Hike Brings Changes for California Employers white paper (nonmember download). And remember to determine if any local minimum wage ordinances apply to your business.

Also on January 1, agricultural employers under Wage Order 14 with 26 or more employees will see the first in a series of phased-in overtime changes. Their agricultural workers, who have historically received time and a half only after 10 hours per day or 60 hours per week, will now receive it after 9.5 hours per day or 55 hours per week. Agricultural employers with 25 or fewer employees remain covered by the old rules for now, but will begin phased-in overtime changes in 2022. These new requirements are a result of AB 1066, signed into law two years ago.

In addition, a few narrow industry wage and hour carve outs were created this year.

Construction Industry PAGA Prohibition

Construction industry employees will be prohibited from pursuing a Private Attorneys General Act (PAGA) claim under AB 1654 where the worker is covered by a collective bargaining agreement (CBA). To qualify for the exemption, the CBA must include a grievance and binding arbitration procedure to address potential Labor Code violations. The new law will remain in effect until January 1, 2028.

Petroleum Facility Rest Break Exception

The recent court ruling of *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 hinders employers' ability to reach employees even in emergency situations because the court determined that employees could not be required to carry instant communication devices during breaks. AB 2605 created an extremely limited exception for required rest breaks in the petroleum industry, allowing employers to require that employees holding safety-sensitive positions at petroleum facilities be on-call and carry instant communication devices

during rest breaks. Employees must be able to make up the missed break or receive a rest break penalty of one hour's pay. This exception applies only at petroleum facilities covered under Wage Order 1 – Manufacturing, and took effect immediately upon being signed by Governor Brown on September 20, 2018.

Meal Break Exception for Feed Truck Drivers

AB 2610 created an extremely limited meal break exception for certain commercial drivers who are transporting commercial feed to customers in remote, rural areas. These drivers will be excluded from the obligation to provide a meal break within the required time period if the driver receives no less than one and one-half times the state minimum wage and overtime compensation when required by law.

Copies of Payroll Records

Existing law allows employees to "inspect or copy" their payroll records. SB 1252 merely makes clarifying changes designed to ensure that employers make and provide the copies rather than requiring that employees find ways to make the copies themselves.

Workplace Health/Safety and Workers' Compensation

Employers' liability for workplace injury reporting violation penalties will be extended from six months to five years under AB 2334. A change in the code's definition of an "occurrence" as it relates only to citations for recordkeeping purposes means citations may be issued for the entire five-year mandatory record retention period until they are corrected or discovered by the California Division of Occupational Safety and Health (Cal/OSHA), or until any recordkeeping duty is eliminated.

If Federal OSHA follows through with its current proposal to eliminate or substantially diminish electronic submission requirements for Logs 300 and 301, AB 2334 directs Cal/OSHA to create an advisory panel to consider how California employers could still be required to continue electronic submission.

Employers' liability for workplace injury reporting violation penalties has been extended from six months to five years.

Liability

Two new laws related to imposing joint liability were signed this year.

Joint Liability — Port Trucking Companies

Joint liability will be imposed on client employers who hire port drayage motor carriers (trucking companies) with certain unpaid employment-related judgments, affecting businesses such as retailers, agriculture and auto dealers who rely on port truckers to transport products from ships. Port trucking companies will be placed on a Division of Labor Standards Enforcement website "blacklist" if they have an unsatisfied final judgment for taxes, various wage and hour violations, unreimbursed expenses, failure to provide workers' compensation coverage, or independent contractor misclassification. A customer that uses a port trucking company on the blacklist will share all civil legal responsibility and civil liability for services obtained after the date the trucking company appeared on the list.

Labor-Related Liabilities — Direct Contractor

For certain private construction contracts, last year's AB 1701 imposed liability onto the general contractor for any unpaid wages, benefits or contributions that a subcontractor owes to a worker under the contract. This year's clean-up bill, AB 1565, removes a provision placed into the Labor Code by AB 1701 that indicated a direct contractor's liability for unpaid wages or benefits is in addition to any obligations and remedies otherwise provided by law and makes other clarifying changes.

AB 1565 is an urgency measure that took effect upon being signed by Governor Brown on September 19, 2018.

Human Trafficking Training

Current law requires that certain types of businesses post human trafficking notices containing hotline numbers to seek help or to report unlawful activity, and information about organizations that provide services to eliminate slavery and human trafficking.

AB 2034 will require that by January 1, 2021, employees of intercity passenger rails, light rails and bus stations who might interact or come into contact with a victim of human trafficking — or are likely to receive a report from another employee about suspected human trafficking — attend a training session of at least 20 minutes on recognizing and reporting suspected human trafficking.

SB 970 requires that by January 1, 2020, certain hotel and motel employees participate in ongoing training to identify, respond to and report human trafficking. At least 20 minutes of classroom or other interactive training must be provided to any hotel or motel employee who's likely to interact or come into contact with victims of human trafficking, including those who work in a reception area, perform housekeeping duties, help customers in moving their possessions or drive customers.

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